

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD SAMUEL MATTOX,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 200288

Ingham Circuit Court

LC No. 96-070605-FC

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for assault with intent to commit murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), following a jury trial. He was sentenced to concurrent prison terms of twenty-five to forty-five years for the assault conviction and three to five years for the felon in possession of a firearm conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

I.

Defendant first argues that the trial court erred in rejecting his challenge to the prosecutor's exercise of a peremptory challenge pursuant to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). We review a trial court's *Batson* ruling for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). A prosecutor cannot use a peremptory challenge to strike a potential juror solely on account of the potential juror's race. *Batson*, *supra* at 89; *People v Barker*, 179 Mich App 702, 707; 446 NW2d 549 (1989). The defendant has the initial burden to establish a prima facie case of purposeful discrimination by showing that he is a member of a cognizable racial group, the prosecutor used a peremptory challenge to remove a member of his race from the jury venire, and that the circumstances raise an inference that the prosecutor intended to exclude the potential juror on account of the juror's race. *Id* at 705. If defendant succeeds in establishing a prima facie case, the burden shifts to the prosecutor to show a racially neutral explanation for challenging the potential juror. *Id* at 706

In this case, we agree with the trial court's conclusion that defendant failed to establish a prima facie case of purposeful discrimination. Defendant failed to show any facts that would

raise an inference of discrimination, other than the fact that both defendant and the challenged juror were black. “The mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination.” *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Even if the defendant had established a prima facie case, the prosecutor offered a racially neutral reason for the challenge. Therefore, the trial court did not abuse its discretion in rejecting defendant’s challenge. *Howard, supra* at 534.

II.

Defendant next argues that the trial court erred in admitting certain evidence at trial. We review this issue for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). Defendant claims that certain documents should not have been admitted because the prosecutor violated the rules of discovery. We conclude that defendant’s argument is without merit because the court never entered an order compelling discovery, defendant did not request production of the documents pursuant to MCR 6.201(A)(5), and the documents did not constitute material exculpatory evidence. *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992).

We agree with defendant that the court abused its discretion in admitting an advertising brochure describing a device that defeated telephone bugging equipment because it was more prejudicial than probative. MRE 403. We also agree that the cellular telephone records should not have been admitted because the records were hearsay and the prosecutor failed to establish their admissibility under MRE 803(6). However, we conclude that the erroneous admission of the brochure and telephone records does not warrant reversal of defendant’s convictions because the errors did not affect the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

III.

Defendant also argues that the evidence was insufficient to support his conviction of felon in possession of a firearm. The elements of felon in possession of a firearm are (1) the defendant possessed a firearm, (2) the defendant was convicted of a felony, and (3) less than five years had elapsed since the defendant served the prison term imposed for the conviction of the felony and successfully completed all conditions of parole. MCL 750.224f(2) and (6); MSA 28.421(6)(2) and (6). In this case, defendant agreed to stipulate that he had been convicted of a “specified felony” conviction and that he had not yet completed the terms of his parole. The stipulations were on the record and the prosecutor referred to the stipulations in both her opening and closing arguments, but the court did not inform the jury about the stipulations.

Although defendant couched this argument as a sufficiency of evidence issue, we believe the proper analysis is that of an evidentiary or instructional error. Generally, it is the burden of the prosecution to admit sufficient evidence to prove the essential elements of the charged offenses beyond a reasonable doubt. *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998). However, in this case, the court was aware that defendant stipulated to the second and third elements of the felon-in-possession offense, yet neglected to inform the jury of the stipulation when it delivered the instructions. Defendant does not contest the validity of the

stipulation, nor does he argue that there is no evidence that supports the elements of the crime, arguing only that this evidence was not submitted to the jury. Hence, the error in this case is more analogous to situations where the court improperly refused to admit evidence or failed to properly instruct the jury. Errors of this nature are subject to harmless error analysis. MCR 2.613¹; MCL 769.26; MSA 28.1096.²

Under a harmless error analysis, reversal of defendant's conviction is not required unless it is more probable than not that the error was outcome determinative. *Lukity, supra* at 495-496. In this case, the jury convicted defendant of the felon-in-possession charge even though the court did not inform the jury of defendant's stipulation to the second and third elements of the offense. It is apparent that the jury would have reached the same result if they had been properly instructed on the stipulation. Because it is more probable than not that the error in failing to admit evidence of the stipulation did not affect the outcome, we will not reverse defendant's conviction.

IV.

Defendant next contests the trial court's decision to limit defense counsel's closing argument. Defendant claims that the court's decision prevented him from arguing his theory of the case to the jury. We review a trial court's decision to limit the arguments of counsel for an abuse of discretion. *People v Buck*, 197 Mich App 404, 413; 495 NW2d 321 (1992) rev'd on other grounds 444 Mich 853 (1993); *People v Gray*, 57 Mich App 289, 295; 225 NW2d 733 (1975).

In this case, defendant claims that the trial court prevented him from arguing that defendant's brother shot the victim. However, review of the transcript reveals that the trial court actually prevented defense counsel from arguing that defendant's brother broke the steering column of the vehicle involved in the crime because there was no evidence supporting counsel's

¹ MCR 2.613(A) provides

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

² MCL 769.26; MSA 28.1096 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

argument. Based on this finding, we conclude that the court properly exercised its discretion by limiting counsel's argument to relevant matters supported by the evidence. MCR 6.414(A); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

V.

Defendant also asserts that the trial court erred in its instructions to the jury. This issue is not preserved for appellate review because defendant failed to object to the instructions at trial. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Because the alleged error is unpreserved, defendant forfeited this issue unless he can demonstrate a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant alleges the trial court erred by improperly instructing the jury on assault with intent to murder and reasonable doubt, by failing to give a limiting instruction, and by referring to "the alleged killing" instead of "the alleged assault" during the instruction on inferring state of mind. We find no error affecting defendant's substantial rights in any of these instructions. The trial court was not obligated to give a limiting instruction because defendant failed to request it. MRE 105; *People v Bahoda*, 448 Mich 261, 291 n 61; 531 NW2d 659 (1995). The court relied on standard jury instructions CJI2d 17.3 and CJI2d 3.2 to accurately state the elements of assault with intent to commit murder and adequately present the concept of reasonable doubt. *People v Haggart*, 142 Mich App 330, 340-341, 370 NW2d 345 (1985); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). While the court misspoke when it referred to the crime as the alleged killing, defendant failed to show how the misstatement affected the outcome of the proceedings. *Carines*, *supra* at 763-764. We conclude that the alleged errors do not warrant reversal of defendant's convictions.

VI.

Defendant next argues that his convictions for felony firearm and felon in possession violate the constitutional prohibition against double jeopardy. The prohibition against being placed twice in jeopardy affords, among other things, protection from multiple punishments for the same offense. *People v Gonzalez*, 197 Mich App 385, 392; 496 NW2d 312 (1992). Multiple punishment for the same conduct violates the prohibition against double jeopardy only if the legislature intended to impose cumulative punishment for similar crimes. *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995). To determine the legislative intent, the court should consider whether the statutes in question prohibit conduct violative of distinct social norms, the amount of punishment authorized by the statutes, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent. *Id.*

In this case, the statutes at issue are intended to prevent conduct that violates distinct social norms. The felony-firearm statute is intended to deter the use of firearms in the commission of a felony and reduce or prevent injury to victims, passersby, and police officers. *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978). The purpose of the felon-in-possession statute is to protect the public by keeping guns out of the hands of convicted felons. *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997). Violation of the felony-firearm statute is punishable by a mandatory two-year sentence to be served consecutive to the underlying felony, while violation of the felon-in-possession statute is punishable by up to five

years in prison and a \$5,000 fine. MCL 750.227b; MSA 28.424(2); MCL 750.224f(3); MSA 28.421(6)(3). Finally, although both felony firearm and felon in possession are weapons offenses, the former prohibits conduct based on how the person uses the weapon, while the latter prohibits certain persons from possessing weapons. These facts make it apparent that there was no legislative intent to enact cumulative punishment for similar crimes, and defendant's convictions for both felony firearm and felon in possession do not constitute double jeopardy.

In addition, our Supreme Court has held that double jeopardy is not implicated by a conviction for felony firearm and another felony weapon offense except one of the four felonies expressly exempted by the felony-firearm statute.³ *People v Mitchell*, 456 Mich 693, 697-698; 575 NW2d 283 (1998). Because the felon-in-possession statute is not one of the four exempted felonies, defendant's double jeopardy challenge fails, and we conclude that defendant's convictions should not be reversed on these grounds.

VII

Defendant also argues that the felon-in-possession statute violates his right to equal protection because it has a disparate impact on people of color. Equal protection of the law is guaranteed by both the United States and Michigan Constitutions. US Const, Am XIV; Const 1963, art 1, § 2. The guarantee of equal protection requires that the government treat similarly situated persons alike. *People v Conat*, 238 Mich App 134, 153; 605 NW2d 49 (1999). However, the equal protection provisions of the Michigan and United States constitutions forbid only purposeful discrimination. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 308; NW2d (1996). A statute that is neutral on its face is not constitutionally invalid simply because it affects a greater proportion of one race than another. *Harville, supra* at 306-307; *Washington v Davis*, 426 US 229, 242; 96 S Ct 2040; 48 L Ed 2d 597 (1976).

In order to prevail on an equal protection challenge, the party raising the challenge must show that the disputed statute has a racially discriminatory purpose. *Conat, supra* at 153. In this case, defendant argues solely that the statute has a disparate impact on minority groups and does not present any evidence of a discriminatory purpose. We conclude that defendant has failed to demonstrate that the felon-in-possession statute violates his right to equal protection of the law.

VIII.

Defendant next asserts that he was denied a fair trial due to several instances of prosecutorial misconduct. Having reviewed the record and evaluating the challenged remarks in context, we conclude that defendant was not deprived of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Defendant failed to preserve most of the alleged claims of error with an appropriate objection below. *People v Grant*, 445 Mich 535,

³ According to MCL 750.227b(1); MSA 28.484(2)(1), the expressly exempted felonies are: (1) the unlawful sale of a pistol, MCL 750.223; MSA 28.240, (2) carrying a concealed weapon, MCL 750.227; MSA 28.424, (3) unlawful possession of a pistol by a licensee, MCL 750.227a; MSA 28.424(1), and (4) altering, removing, or obliterating identifying marks on a firearm, MCL 750.230; MSA 28.427.

546; 520 NW2d 123 (1994). For the few instances where error has been shown, defendant failed to request a curative instruction that could have remedied any prejudicial effect. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994); *People v David Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant has not demonstrated that any of these errors affected the outcome of the proceedings, therefore, reversal is not warranted. *Carines, supra* at 763-764; *Lukity, supra* 495-496.

IX.

Defendant also argues that he was denied the effective assistance of trial counsel. Because defendant failed to raise this issue in a request for a new trial or a *Ginther*⁴ hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; NW2d (2000). To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). After reviewing the record, we conclude that the few, minor errors asserted by defendant were so not prejudicial that he was deprived of a new trial, and we will not reverse defendant's conviction on this basis.

X.

In his last assertion of error, defendant argues that the cumulative effect of several errors warrant a new trial. We disagree. The few preserved errors established by defendant did not deprive him of a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).